

THE
RIGHTS AND POWERS
OF
CAPTORS AND PRIZE AGENTS,
OVER
CAPTURES AND PROCEEDS,
BEFORE FINAL SENTENCE, CONSIDERED :
BEING THE SUBSTANCE OF A JUDGMENT PRONOUNCED
IN THE COURT OF VICE-ADMIRALTY AT HALIFAX,
UPON THE RETURN TO A MONITION IN
THE CASE OF THE HERKIMER,
ON THE 26th JANUARY, 1808.

PUBLISHED AT THE REQUEST OF MANY OF THE GENTLEMEN
CONCERNED IN PRIZE CAUSES.

HALIFAX :
PRINTED BY HOWE AND SON.

1808.

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THE SUBSTANCE OF A JUDGMENT,
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[DR. CROKE.]

THE case which now remains for the decision of this Court, arises upon a Monition issued against *Andrew Belcher*, Esquire, "to bring into the Registry the sum of £.41,671 19 4, being the proceeds of the ship *Herkimer* and cargo; and also interest thereon at the rate of five pounds per centum per annum, to commence from six months from the day of sale; or to shew cause why he should not pay the same." This vessel and cargo were condemned on the 1st of August, 1806, and an appeal was entered on the 6th of the same month. A decree of unlivery and appraisement was sued out, and on the return the valuation of the ship appeared to be £.3000, of the cargo £.37,896 5 3, making in the whole £.40,896 5 3 Currency. A motion was made by the captors to take the property upon bail, but difficulties having occurred in procuring securities, the parties jointly prayed the Court to direct a sale of the property, and the proceeds to be paid into the Registry. The commissions for the sale of ship and cargo issued on the 18th and 27th of September, returnable in the usual form in one month. The sale by public auction was made on the 29th of September, 1806, by Messrs. *Hill & Co.* The conditions were, that the purchase money should be paid in six months, when, Mr. *Belcher* became the purchaser of the ship, and the greater part of the cargo, for the sum of £.41,671 19 4. The Marshal returned the commission of sale, without the proceeds, which he alleged were in the hands of the purchaser, to whom he had applied for payment, but without effect. Upon

the 23d September, 1807, a general order of the Court was made for all purchasers of prize goods to pay in the proceeds. No notice of this order was taken; a second general order was then made upon the 29th of December, and a monition was issued against Mr. *Belcher*.

To this monition an appearance has now been given under a protest against the jurisdiction of the Court, which it will be necessary first to consider, because if the Court has gone beyond the line of its authority, the party is entitled to his dismissal.

The substantial part of the protest alledges, "that the said ship *Herkimer* and her cargo were sold at public auction by *Charles Hill* and Company of Halifax, Auctioneers, in pursuance of an advertisement inserted in the public newspapers of Halifax inviting purchasers to the said auction; that the proponent was one among the bidders at the said auction, and being the highest bidder for the said ship and cargo, did purchase the same of the said *Charles Hill* and Company, for the sum of £.41,671 19 4, and received from him a bill of parcels of the said purchase in the name of the said *Charles Hill* and Company, as Auctioneers, and not as persons acting under the authority of this Worshipful Court, as appears by the said bill of parcels hereunto annexed, and the proponent humbly submits that the said *Charles Hill* and Company alone can be entitled to enforce the payment of the said £.41,671 19 4, so bid by him for the ship *Herkimer* and cargo as aforesaid. This proponent therefore humbly prays the judgment of this Worshipful Court, whether he the proponent is bound to submit to the jurisdiction of this Court in the matter of the said monition."

"Sworn to and signed by *Andrew Belcher*."

In arguing upon this protest, it was assumed by Counsel that the contract of sale was made merely with the

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Auctioneer, and the sale itself not under the authority of the Court of Admiralty—I do not think it at all material to the case, but the facts will not bear them out in this assumption. The advertisement in the public papers expressly stated the sale to be made by the authority of the Court of Admiralty; the bill of parcels, annexed to the protest, is headed "*Andrew Belcher Esq. bought of Charles Hill and Company at Admiralty sales;*" and it is to be observed that Mr. Belcher has not sworn positively that he *purchased* the goods of Messrs. Hill and Company merely as Auctioneers, and not as persons acting under the authority of the Court of Admiralty, but that Messrs. Hill and Company had so stated themselves in the bills of parcels.

But admitting the fact in its fullest extent, still there is nothing upon the face of the monition itself, or in this protest which can oust the Court of its jurisdiction. The respondent is monished to pay a certain sum of money which is alledged to be the proceeds of the ship Herkimer and cargo. Upon that allegation the jurisdiction of the Court is founded. Mr. B. admits that he is in possession of those proceeds. Whether he purchased them at public auction, whether he may be answerable for the amount to Messrs. Hill & Co. is perfectly irrelevant; for the stubborn fact still remains unshaken, that the respondent is in possession of the proceeds of this Ship and Cargo. Whatever matter therefore may be pleaded in answer to the monition, the admitted fact is sufficient to found the jurisdiction of the Court; which has the exclusive cognizance of Prize, and the proceeds of Prize, with all incidental questions which may arise.

The Court will naturally feel some degree of delicacy in discussing the subject of its own authority, it affords it therefore a considerable degree of satisfaction, that it

is able not to rest the point upon its own assertions but rather to refer to the decisions of other Courts of Justice, those of Westminster Hall, and in cases of prohibition.

The Solicitor General quoted a *dictum* of Lord Kenyon, in the case of *Smart* against *Wolff*, in support of this protest, "that if the legal property in prize goods was altered, as by sale *in market overt*, the Court of Admiralty might no longer have jurisdiction over them." In the first place, this mere *obiter dictum* of that eminent Judge, expressed too with some hesitation, was not admitted by another Judge upon the bench, of no less respectability, Mr. Justice Buller, who doubted, supposing the plaintiffs had obtained these goods under a legal title, under which "they might have retained the possession, whether that circumstance would be a ground for prohibition."—Supposing, he says, that they had obtained the possession of them in market overt, or under any legal title, still I think a prohibition ought not to be granted on that account, "because," he adds afterwards, "that he does not see why they could not defend themselves upon that plea in the Admiralty, as well as in other Courts."

But, secondly, to make this *dictum* applicable to the present case, it should have been a monition to call in the ship and cargo themselves. Had a monition to that effect been directed to a person who had *bona fide* purchased them at public auction, whether under the Marshall's authority, or in the common course of trade, the party might have availed himself of Lord Kenyon's opinion, as far as it was valid; but this is a monition not to call in property sold in market overt, but the price, the proceeds of that property so sold, and which are admitted to be in the parties hands.

Upon that point, this case of *Smart* and *Wolff* is deci-

five. It was there adjudged, that the Court of Admiralty has the power, which it has repeatedly exercised, of issuing monitions to require persons to bring in so much of the proceeds of Prize as remains in their hands, *as having the possession of the proceeds by whatever means they may have been obtained.* "The proceedings in that case were said by Judge Buller to have been founded on the plaintiff's *having the possession of the proceeds*, in which character they are amenable to the Court of Admiralty."

In the case of the Danish ship *Nøysamhed*, 7 Ves. junr. 593. a prohibition was moved for upon grounds something similar, though still stronger, than what is stated in this protest, and have been argued so warmly by the Advocates, namely, that the contract was with the Auctioneer, mere matter of account with him, and perhaps settled. A cargo was condemned by the Vice Admiralty Court at Tortola, was sent to *Chorley* at Liverpool, and was sold by him for the benefit of the captors. The Court of Appeals reversed the sentence and decreed restitution. A monition issued against *Chorley* for the proceeds. He moved for a prohibition on the ground that the property was consigned to him, *not as a Prize Agent, but as a general Merchant, and that he had since accounted for the proceeds to the Consignors*, but the Lord Chancellor thought that a question proper for the Court of Admiralty to decide, as incidental to the principal question of Prize; and that therefore he was not authorised to grant a prohibition.

In a subsequent case, *Willis* against the Commissioners of Appeals in Prize Cause, East. 5. 22. it was thus laid down by Lord *Ellenborough*, "It is clear that the Court of Admiralty has jurisdiction *in rem*, and may take into its possession the thing itself, or the proceeds wherever they may be found, either in the hands of the principal

Captor, or Agent, or of any other, who has no lawful title to hold them." And Justice *Laurence* adds, "it is supposed that the Prize Court has jurisdiction over the Agent only under the Prize Acts; but that is not so; for if those Acts had never been passed that Court would have had jurisdiction over the *res*, and the proceeds of it, *into* whatever hands they get."

These cases clearly shew, that the jurisdiction of the Court of Admiralty over Prize, and the proceeds of Prize, wherever they may be found, and under whatever title they may have been obtained, is almost without limit, or controul, and that the grounds stated in the protest, and in the arguments adduced by the gentlemen at the bar, are not founded in law; and I therefore over-rule the protest.

The monition then having been issued within the proper jurisdiction of the Court, the respondent is bound to comply with the requisition contained in it, either by paying the money, or shewing cause why it should not be paid. This he has done in his answer and return, upon oath.

In this he states "that a proposal was made by the claimants after condemnation to purchase the ship and cargo from the captors; after much negotiation the captors consented to sell the same to the claimants for £.24,000 Halifax currency.—That Captain *Henry Whitby* who captured the ship, told the respondent that he would prefer taking £.24,000 than to the receiving the proceeds three or four years afterwards.—That in consequence, Captain *Whitby*, his officers, and crew, unsolicited by the respondent, and without consulting him, executed to him a special *Letter of Agency*, authorising him on their behalf to sell the said Prize, subject to all incumbrances, for £.24,000, ratifying whatever bargain or agreement the said respon-

dent should make, provided he obtained the said sum of £.24,000 to be divided to the captors, without deduction.—That in consequence he agreed with *Edward Griswold*, one of the parties in the claim, who was fully empowered by all the other claimants, to sell the same for the aforesaid sum together with every expence which had or might occur, upon condition that he should engage on behalf of said claimants to discontinue and withdraw the appeal; and the respondent and *Edward Griswold*, did, for and on behalf of their respective constituents, conclude the aforesaid *Bargain of Sale*.

“ That when the parties were about to carry the said agreement into effect, *John Poo Beresford*, Esquire, on whom as senior officer the command of His Majesty's Ships devolved, claimed as Flag Officer one eighth part of the said Prize, and, upon his asserted interest, objected to the agreement, and applied to this Court to prevent the same from being carried into effect, whereby the said agreement was prevented from being completed, and the captors became involved in a legal controversy.—But the captors being of opinion that Captain *Beresford's* claim would never be admitted in a Court of Law, and the agreement beneficial to them, expressed their desire to carry the same into effect, and to put an end to the controversy notwithstanding; and for that purpose moved the Court for an order for the sale of the ship and cargo, and it was agreed by the respondent and *Griswold* that the respondent should purchase ship and cargo at public auction for the purpose as aforesaid, and that he should hold the property so purchased to the amount of £.24,000, and the captors expences, and that the remainder should be held by the claimants.

“ That the ship and cargo were accordingly put up

to auction, and purchased by the respondent for £41,671 19 4, and he believes if he had not bid they would not have produced much above £.36,000.

"That he would not have been concerned if he had apprehended that it would have been required of him to pay into Court the proceeds—the particular object being to carry into effect the agreement.

"That after the sale the respondent retained of the cargo to the amount of £24,000, and the remainder was delivered to *Edward Griswold* upon the express condition that the same should be refunded in the event that the sale made by him could not be carried into effect, and that it should finally be determined that the appeal should be prosecuted.

"That the respondent considers himself responsible to the captors for £.24,000, and bound to pay whenever all the difficulties which prevented the final execution of the agreement should be removed.

"That a part retained, the bark and copper, amounting to £.17,747 19, was sent to London and insured. The 16th December, 1806, he shipped the bark in the *Yarico*, which was captured.—On the 13th February, 1807, he shipped the copper in the *Trusty*, which was lost, she sailed 21st February.—That he is advised that it will be impracticable to recover from the Underwriters until he receives a certificate of the Custom House at Halifax, dated one year and a day from the sailing of the vessel, that she had not been heard of.

"That the parties proceeded to carry the agreement into effect. The opinion of Sir *J. Nichol* was taken, who declared the aforesaid agreement could be validly carried into effect, after giving due notice to the parties who had not assented.

"That a meeting was held, and that it was agreed that Captain *Whitby* should give indemnity against

Captain *Beresford's* claim, and others.—That he believes that all difficulty has been removed—that *Griewood* directed *James Stewart*, Esquire, to withdraw the appeal whenever the agreement could be carried into effect, and which he is ready and willing to do, and the captors and claimants are satisfied and content the property should rest and remain as it is, and Captain *Beresford's* Agents are likewise satisfied.

“That the respondent owns property, free from debts, to a larger amount than £24,000, and has property sufficient to pay £41 671, but it would be highly detrimental if not ruinous to him to be compelled to pay either the said sums into Court, when he has received but a small part—that he has not derived the smallest advantage from this transaction; and that it would be grievously oppressive upon him to enforce obedience to a monition which no person interested in the said Prize, or any part thereof, wishes should be enforced against him.”

Upon this answer, as was properly stated by the Counsel, two questions arise, 1st. Whether there was any thing illegal in the agreement of sale between the captors and claimants? And 2dly. Whether the Court had any right to interfere?

In considering the first question it is necessary to ascertain precisely in what situation the respondent stands before the Court, since that situation has been represented by his Counsel in a variety of different lights.

If he is to be taken as a mere purchaser, as was sometimes stated in the arguments, the whole of the answer is perfectly irrelevant. For from the moment the purchase at auction was complete, the ship and cargo were the absolute property of the purchaser, to dispose of in what manner he pleased, nor is the Court in the least concerned in any subsequent transactions: but then the

respondent, the same as any other indifferent person, is liable to pay the price, according to the conditions of sale, and no legal defence can be set up against the payment.

But it appears from this answer, and the arguments of his Counsel, that the respondent does not place his case upon that footing. He states himself to have been an Agent, authorised by Captain *Whitby*, and the crew of the *Leander*, to sell to the claimants in this case, the *Herkimer* and her cargo, for the sum of £24,000 and the charges; that the sale made by Mr. *Hill* was only an amicable sale, merely between the parties to ascertain the value; that the parties never intended it to be a real sale, but a mere form to enable them to carry the agreement into execution, that the respondent therefore, the nominal purchaser, was not liable to be called upon to pay into Court the proceeds of that sale, but was answerable only to the captors, and for the sums which they had deposited with him in consequence of these agreements, namely, the £24,000 and the surplus for expences, after *Grifwold's* £9,704 were deducted, and which £24,000, together with the surplus, were in reality the sum, or price, which *Grifwold* had paid the captors for the *Herkimer* and cargo, under the *bargain and sale*.

A great deal of argument has been used to prove the legality of compromises. It does not seem to me to have any thing to do with the present question. Compromises no doubt have been, and may still be made. Parties may recede from their rights, may desert their appeals, and may dispose of their interests, whether present, or only remote, or contingent, upon any terms or conditions they chuse; but the real question before the Court upon *this* defence is, whether the captors have such a vested interest in the Prize itself, or the proceeds of the Prize, in the present stage of the cause,

that they can take possession of them, and alienate them, without any authority from, and in defiance of, the Court of Admiralty.

I must own I have my own private opinion upon compromises: that they are making a *job* of war, not very honorable to the nation, and bad policy in the end for the navy themselves; and many high and eminent persons have entertained the same idea. But that is only my own private opinion, and I am certainly not disposed to throw any impediment in the way of a compromise, when conducted in a legal, justifiable, manner, and the parties think it for their interest; as I trust I have ever endeavored to promote the real good and advantage of the service, as far as was consistent with an impartial performance of my duty. But I cannot but resist an attempt in parties to take the whole law into their own hands, and to wrest Prize property out of the legal custody of the Court.

If this power of attorney, and the agreement founded upon it, were merely *executory*, and to operate only after final sentence, as was contended by the King's Advocate, I do not see how they could at all apply to the present state of the case; they cannot be any authority to the respondent to keep possession of, or to dispose of, capture or proceeds, until the time arrives when they are to become operative. They cannot, as powers from the captors, or as agreements with the claimants, justify an intermediate possession, or disposal of the capture or proceeds; unless he has a right to such possession, or to make such disposal, from some other quarter.

But I think it is pretty evident, that this power, and agreement, are in *verbis de presenti*, and have been actually *executed*, as was admitted by the King's Solicitor. Such was clearly the intention and understanding of the parties. The respondent was in possession

of the ship and cargo. He says in his answer, that "he and Edward Griswold *did conclude the Bargain and Sale.*" It was actually carried into effect, for the respondent, retaining in his own hands a part of the cargo to the amount of £. 24,000, and upwards, as an equivalent for the purchase money which *Griswold* was engaged to pay, delivered the vessel, and the remainder of the cargo to Mr. *Griswold*. There was indeed an agreement, that in case the former agreement could not be carried into effect, that *Edward Griswold* should refund the sum of £. 9,704. 10, but the sale subject to that sort of contingent defeasance, was nevertheless actually made and completed as a present transaction, by delivery of the goods, and the payment of the price.

The question then, whether this is a legal agreement, or, in other words, whether the parties had a right to sell the ship and cargo to the claimants, in the present stage of the cause, depends upon these points :

1st. Whether captors have a *disposeable property* in things captured, or the proceeds of them, before final adjudication ? And what is the final adjudication ?

2dly. If they have no disposeable property, it will be necessary to consider who is entitled to the *custody or possession*, of captures and proceeds until that period ? And how that right of custody or possession is to be exercised ?

Upon the first point it must be observed, that even after final sentence, and condemnation, it is far from being clear and certain that the captors would become entitled to the whole or even any part of the capture.

1. It is possible that the Crown might claim the *whole* of this prize. By one clause of the Prize Act, it is enacted that upon proof of the breach of any of His Majesty's instructions relating to prizes, or of any offence against the law of nations committed by the captors in relation to any prize, or the persons taken on

board the same, the prize shall be condemned to His Majesty's use and disposal. Sec. 32. Prize Act.

By another clause, sec. 20. it is enacted, that in case any ship or goods shall be taken and restored by the commander of any vessel of war belonging to His Majesty, clandestinely, or by collusion, or connivance, or by consent, (unless the same shall afterwards be allowed and approved by the Court of Admiralty) such commander shall forfeit the sum of £.1000, and the goods and ship so taken and restored shall be adjudged as good prize to His Majesty.

It is not for me to decide, in the present stage of the cause, whether such a forfeiture has been incurred. But is it clear that it has not? It is capable at least of some doubt, and argument: this ship and goods have been certainly taken and restored by the commander, and can it be said otherwise than clandestinely by collusion, connivance, or consent, since it was done by a private agreement, under color of a sale, and was not allowed or approved by the Court of Admiralty. In the former part of the clause relating to privateers, the words "without being brought to adjudication" are introduced; but in the latter part, respecting King's ships, no such qualification is to be found; so that the clause applies to a restitution at any time before final sentence. Under the *direct words and apparent meaning* of the Act the case does *most certainly come*. It was argued by Counsel that it could not be the intention of the Act to apply to *compromises*. Be it so, if the compromise, was of such a kind that it could be legally carried into execution; as a compromise which was not to take effect until after final sentence. But would this equitable interpretation hold good, if the compromise was of such a nature that it could not be legally supported? If the captors had restore

the ship and cargo before they had a right to do?

It is certainly the *spirit* of the Act to prevent connivance between parties, and restitutions without the intervention of the Court of Admiralty. In all other cases of compromise the parties have not proceeded to carry them into execution, until the property was legally delivered by the Court, upon a final sentence of condemnation, or restitution by agreement. In *Berens and Rucker*, the property was not sold or disposed of; for one reason assigned for the compromise was to enable the parties to obtain a final sentence in order to sell and take advantage of the markets, when restored by final sentence, and not before, notwithstanding the agreement of the two parties, the vessel proceeded to Amsterdam.

But here all has been done without any intervention of the Court, or final sentence obtained. Under colour of an order for sale, which the parties themselves represent as a merely fictitious, and not a *bona fide* sale, merely between the parties to ascertain the value, and never meant to be a real sale, the compromise and restitution have been completed. If this does not amount to a connivance, and real restitution, I do not know what does. Nothing remains for the Court to do; the parties have no occasion for any farther proceedings, they do not stand in need of any farther sentence. They have got the property, and as they have made a *private division* of it, so they may proceed to a *private distribution*, and if, according to the arguments of Counsel, these are the only parties interested, who else has a right to interfere? The Court of Admiralty, and the Prize cause may rest in *statu quo* to eternity, these parties have certainly no farther occasion for them, the business is as much completed, without final sentence of

the Court, and any cognizance in, or intervention of, the Court, as if the whole had been done at sea—the very mischief intended by the Act to be guarded against.

The Act does indeed speak of restorations which may be allowed and approved afterwards by the Court of Admiralty, but this must refer to cases of necessity, or under very peculiar circumstances; not to cases, where, without any plea of that kind, the whole law of prize has been subverted.

So far then from its being clear that a forfeiture has not been incurred, I think a very strong case might be made on behalf of the Crown: So strong that I cannot but entertain very great doubts whether it is not the duty of His Majesty's Advocate to enter an appeal on his behalf against the sentence of this Court, or even of the Court itself, to direct such an appeal to be entered, and prosecuted in the Court of Appeals.— Since it is incumbent both on the Court itself, and his Majesty's officers, whenever any apparent interests of the Crown arise, to intervene on behalf of the Crown, and bring them forwards, to place them in a train for discussion, and, if well founded, to give them effect.

It is not in that view however that I *now* refer to these clauses in the Act; but merely to shew that it is extremely possible that, in consequence of these very transactions, the parties may have no interest whatever in this capture, either present or future.

If this claim of the Crown is well founded, it is liable to be barred by no time, or limitation whatever. In the case of the *Clarissa*, before the Lords, 20th July, 1799, the Admiralty intervened as in a case of forfeiture to the Crown, on account of malfeasance by the captain. An appearance was given by the captor, under protest, upon three several grounds, viz, that

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the captor should first have been proceeded against criminally, ad. that the time of appeal had expired; and 3dly, that distribution had taken place.—The protest was overruled by the Court, on all these points, and it was held that the limitations in the Act apply only to the question of prize or no prize, or between captors and claimants, and do not bind the Crown as against the captors; and that the Crown can be guilty of no *laches*.

2. Other persons besides the actual captors, may be entitled to *share*: Vessels may have been in sight, which may hereafter claim as joint captors. It is usual for joint captors not to assert their interest until after final condemnation.

I shall say nothing respecting the claim of Commodore *Beresford*, or other persons, to the Flag-eighth, since it has been stated, though without any documents, that no opposition will be made from those interests. But the power of attorney itself was not signed by the whole of the officers and crew, who are therefore not bound by it.

Greenwich Hospital has two different claims upon the proceeds of prize.—By the 46th GEO. III. C. 101, it is entitled to £.3 6 8 per centum, on the net proceeds of every prize. This claim is paramount to any Prize Act or Proclamation.

By the Marshal's return of the commission of sale, it appears upon the records of this Court, that the gross proceeds of this prize were £.41,000, after deducting all necessary charges. May not the Hospital be entitled to a per centage upon this sum?

By the Prize Act, Greenwich Hospital is entitled not only to all unclaimed shares, but to all unpaid balances of the proceeds of prize, which shall remain after distribution shall have commenced six months. It will

appear in the records of the Court that those proceeds are £.41,000, deducting charges, and that they are in the hands of the Agent. If, according to these agreements, the captors shall divide only £.24,000, will not Greenwich Hospital have a right to demand the residue as an unclaimed balance?

I have now shewn that there are actual, contingent, and possible interests in the proceeds of prize, besides those of the captors, even to the extent of totally annihilating the captors rights; and consequently that the captors can make no disposition or alienation of the capture, even as to the future contingent event of condemnation, by which those other actual, contingent, or possible interests may be affected; nor can any agreements between the captors and claimants enure to the defeating of those interests, which will still have a lien upon those proceeds, to the full amount as they appear upon the records of the Court, according to their respective extent.

As to the *present interest*, nothing can be more certain than that *before final condemnation* the captors have no legal interest in the capture at all, nothing which they can by any possibility convey to another, either in the name of a compromise, or of any other denomination, and that in case of an appeal, the first sentence is not the final sentence, but the ultimate decision upon the appeal.

This is too clear to admit of a doubt. It is a question which has been most accurately examined, and deliberately settled in some of the most solemn decisions, which have ever taken place in the British Courts of Justice—Ships and goods, taken as prize, belong to the Crown, as the Representative of the Nation—No subject has any right to them but by express grant from His Majesty. Those grants are subject to any restrictions and limitations, which His Majesty

thinks proper to make. What is not expressly granted, or comes within any limitations, or restrictions in the grant, is an interest still remaining in the Crown. The captors title deeds are the King's Proclamation, and the Prize Act. The Proclamation directs that prizes may be lawfully sold or disposed of by captors and their agents, *after the same shall have been to His Majesty finally adjudged lawful prize, and not otherwise.* By the Prize Act, the whole interest and property is given to the captors, expressly "*after the same shall have been adjudged lawful prize to His Majesty.*" The interest in prize, therefore, before final condemnation, not having been granted to the captors, still remains with His Majesty.

These are not mere abstract and theoretical doctrines, and the interest of the Crown a fiction of law.—It is a real disposeable interest, and accordingly in the case of *the Elzebé, Maas*, (5 Rob.) it was decided, "*that the Crown can release ships and goods that have been taken jure belli before adjudication, without the consent of the captors.*"

These points were the subject of discussion in the case of *Horne* against Lord Camden.—Few cases were ever more frequently and deliberately argued.—The action was first brought in the Court of Common Pleas, from thence it was removed by appeal to the Court of King's Bench, and finally by writ of error to the House of Lords. It was there referred to the Twelve Judges, who delivered their unanimous and elaborate opinion by Lord Chief Justice Eyre. (*H. Blackstone*, II. p. 533.) After recognizing the general doctrine that the interest and property "*do not vest until after the same shall have been finally adjudged lawful prize to his Majesty.*" Lord Chief Justice Eyre proceeds to state, "*that the effect of an appeal is to suspend the force of the*

sentence. From the moment of the appeal being interposed, the sentence is no longer *final*; on the contrary is liable to be reversed in part or in whole."—After arguing this point at length, he concludes, "your Lordships will see how perfectly inconsistent with the plan of the Prize Act this notion of the interest and property vesting in the captors, at any time before the final adjudication in the Court of Appeal, will be found to be. In truth, so far from the interest and property vesting at an earlier period, the Legislature by the words seems to have cautiously guarded against its being so understood."

But the decision in that case does not rest even here, after settling that the captors had no interest it proceeds to consider particularly the power of Agents over captures and proceeds.

"If it be the true construction of the Prize Acts, that no interest or property vested in the Navy, until after the final adjudication by the Commissioners of Appeals, it follows that the Agents proceeding to sell soon after the sentence in the Admiralty Court, must be without colour of authority. In this stage of the proceedings, the Agent could only act under the authority of the Prize Court; and in the manner in which such Agents usually do act.—Acting *under* the authority of the Prize Court, they would be to *account* to the Prize Court; acting *without* the authority of the Prize Court, they would be in the condition of mere strangers, who had *possessed themselves of the proceeds of a prize*, to whom it is admitted, a monition might and ought to be issued, to compel them to bring in proceeds." He goes on to state, that "Agents, though perhaps they may be *appointed* before the final adjudication of the prize, have nothing to do until after the final adjudication has taken place, that all the dif-

ferent sections of the Prize Act, which give powers of impose duties upon Agents, all respect sales in order to distribution." "The result of these observations is," says Lord Chief Justice Eyre, "that that whole case, (and I think I may add the whole of the present case) rests upon two fundamental errors—the first, that an interest and property vested in the Navy as captors, long before it could by any possibility vest; the second, that the Navy Agents had authority under the Prize Acts to take upon themselves the management, and disposition of the prize long before such authority could be derived to them."

This case then being decisive that captors have no interest or property in prize, and that Agents have no right to sell, until after final adjudication, it follows that an agreement entered into by them for the sale of a ship and cargo to the claimants, before that period, is not a legal, or valid agreement.

2dly. Had the captors then any right to the possession of the ship and cargo, or of the proceeds, and therefore under cover of a legal possession of the one, or of the other, might give effect to the agreement?

This leads us to the next point proposed, namely, who is entitled to the custody or possession of prize until final adjudication, and how it is to be exercised?

This question, in general, is answered by the same high authority, Lord Chief Justice Eyre says, in the same case, "I take it to be clear, and it was so stated by the civilians in the case of *Smart and Wolff*. (3 T. R. 323.) that pending a suit in the Prize Court, the ship and goods are in the custody of the Court, the interests of all concerned in the capture, are under the protection of the Court."

The manner in which the Court is bound to execute this trust imposed upon it, depends chiefly upon

the respective Prize Acts: I say chiefly, because it is well known that "these Acts form a portion only of the law of prize, and that a great part of the Admiralty jurisdiction is founded on the established usages and common law of that Court."

In the *High Court of Admiralty*, captors are left in possession of the capture until final sentence, unless it is taken out of their hands by the Court; usually in two cases, that of *delivery* upon bail, and of a *sale* under a perishable monition, upon farther proof, or sentence and appeal. Even *there* upon every sale the proceeds are taken out of the captor's possession and are remitted by the Commissioners to the Registrar of the Court of Admiralty, to remain until final adjudication.

In the Courts of *Vice Admiralty*, a different mode is pointed out by the Acts of Parliament. At the very commencement the prize is taken out of the captors hands, the Marshal, to whom the Officer of the Customs is added by the Prize Act, takes the vessel and cargo into his custody. Being once in the custody of the Court, neither the prize itself, nor the proceeds arising from the sale of it, which are the representatives of the prize, can be taken out of, or retained from that custody, but by the authority of the Court itself, or the superior Court of Appeals.

The Prize Act, in case of appeal, first provides that the execution of the sentence appealed from shall not be suspended in case the party appellate shall give security for the full value of the ship or goods:—adly, captures may be delivered either to captor or claimant upon giving security for the full value thereof.

In both these cases, the only cases in which the Act directs the delivery of captures to the parties, security is to be given for the full value.

We come now to the third case provided for by the Act, that of a sale. "If there shall be any difficulty or sufficient objection to giving security, the Judge shall, at the request of either of the parties, order such goods and effects to be entered, landed, and sold by public auction, under the care and *custody* of the proper Officers of the Customs, and under the direction and inspection of such persons as shall be appointed by the claimants and captors."

How the proceeds of sale are to be disposed of is the next question. There are two Acts which direct the Court upon this head—the one enacts what shall, and the other what shall not, be done.—The Prize Act says positively, "that the monies arising from the sale *shall* be brought into Court, and by the Registrar *shall* be deposited in the Bank of England, or, (in case the captors and claimants shall agree thereto) in some public security at interest, in the name of the Registrar and of such trustees as the captor and claimant shall appoint." The other Act, 41st GEO. III. C. 96, which is a perpetual Act, and expressly confirmed by the Prize Act, says, "Whereas it is expedient that the proceeds of property captured and converted by sale should be secured until final adjudication; be it enacted, that *in all cases* when a commission of appraisement and sale is granted by the Judge of the Vice Admiralty Court before *final sentence*, the proceeds of such sale shall *not remain in the hands of the captors or their agents, but shall* be brought into the Registry of the Court, and remain subject to the farther orders of the Court until final sentence."

The cautious, systematic, and well considered regulations of the Acts, with the practical interpretation of them by Prize Courts, for the safe custody of the property is very observable. The captured itself is either in the

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custody of the law, or it may be delivered to the parties upon sufficient security; if sold, the proceeds must be left in the Registry in the actual custody of the Court, or placed in the public funds in the name of the Registrar, and consequently still in the protection of the Court,—these are the only alternatives—no power is given to leave the capture in private hands without security given, or the proceeds in any case whatever.

Which of the courses prescribed by the Act have been followed in the present case?

The ship and cargo were not delivered to either of the parties upon bail, because sufficient securities could not be found.

Upon the joint motion of both parties the other alternative was adopted: it was sold under a commission from the Court.

An argument was advanced by the King's Advocate, that "this sale was not made under the authority of the Prize Act, or in conformity to the regulations prescribed in it, and that the Agent could only have been answerable for the proceeds if the commission of sale had been directed to him."

If the fact were as represented, still the conclusion would not follow, because, as proceeds of prize, which they are admitted to be, however acquired, they are liable to be called in, unless the party can shew a legal title to retain them.

But the proceedings in this respect have been perfectly regular, and conformable to the Prize Act. It was said by the King's Advocate, that the sale ought to have been made by the Prize Agent, under the 53d section of the Act, which directs that "all appraisements and sales shall be made by agents appointed by the Flag Officers, &c." This clause has received a judicial interpretation in the case I have so often referred

to, *Horne* against Lord *Cambden*, where it is expressly held to relate "to appraisements and sales after final adjudication," only.

It was then said that the ship and cargo were not "sold under the direction and inspection of such persons as shall be appointed by the claimants and captors," under the 52d clause. The Act does not direct the sale to be made by such nominees, *that* by the usual course and practice of the Admiralty is done by commission to the Marshal. The parties have a right if they chose to exert it, that the sale shall be conducted under the direction and inspection of such persons as they shall appoint, but if no such persons are appointed they must be taken to have waived their right; and since the sale took place upon a joint motion of the parties that the property should be sold by the Marshal, *he* may in some measure be considered as their nominee to direct and inspect the sale.

The sale then was conducted in the usual manner: In virtue of the commission directed to the Marshal the ship and goods were advertised as being to be sold under the authority of the Court of Vice Admiralty; they were put up to auction, by Messrs. *Hill*, and Co. and were knocked down to the respondent as the highest bidder.

Upon this review of the Prize Acts, it appears that as to the *right of possession* the parties could only acquire the possession of *ship and cargo* upon *bail*, or as *purchasers*. They were not entitled to it upon *bail*, as that mode was found impracticable; if they acquired it as *purchasers* they are answerable for the purchase money, as before stated. And as to the possession of the *proceeds*, they are not entitled to it, either as parties, agents, or purchasers, *in any case whatever*, but are bound to pay them into the Registry.

Right, then, the parties having

Court be justified in allowing the respondent to retain the proceeds, contrary to the Prize Acts, for the purpose of effecting an agreement which in itself is substantially illegal, and to support arrangements which the parties had no power whatever to make?

This brings me to the second question, made by Counsel.

It is farther pleaded in the answer, "that the captors, and claimants, and the agents of Captain *Beresford*, are all satisfied with the security they now have, and are willing to allow the property to remain where it is at present."

Not only no power or authority whatever is given to the Court to permit proceeds to be lodged in private hands, but the words of the Act are very positive against it; "that the proceeds *shall* be paid into Court, and *shall not* remain in the hands of the captors' agent." How then can any consent, or acquiescence amongst the parties, set aside a positive direction to the Court?

No such power is given them by the Act itself, but the direct contrary may be inferred from it. Certain things are allowed to be done "*in case captors and claimants shall agree*," such as that, proceeds may be placed in public security at interest, instead of the Bank: in another clause that "property, with the consent of captors and claimants, may be sent to England for sale." But if captors and claimants, *by their joint consent*, could dispose of proceeds in a different manner from what the Prize Acts direct, these clauses, empowering them to make a particular disposition in certain cases, would be totally nugatory. The introduction of these clauses is therefore complete proof, that, in the opinion of the Legislature, claimants and captors, by their joint consent, can make no disposition of captures

So with respect to delivery upon bail. There is no point upon which it should seem that parties might be more safely trusted to agree than upon the sufficiency of the securities. Yet here the competence of the bail is not left to the mere acquiescence and satisfaction of the parties. A warrant is always directed to the Marshal to enquire into and report the sufficiency of the security proposed. —How then can it be contended that the consent of parties can justify the Court in leaving this property without any security at all?

How little latitude is given by the Acts to parties jointly agreeing as to the disposition of proceeds— They have only their choice between the Bank of England, and other *public security*—This joint consent gives no power of making any other disposition, and even then the proceeds are still in the custody of the Court, for the property stands in the name of the Registrar, as well as of the other trustees. How then can this consent be an authority to the Court, to suffer property to remain in the possession of private persons?

For who are these parties who assume a right to authorize the Court to permit this property to remain in private hands, and without the security required by the Acts? They are parties, who, as has been already proved, have no legal interest or property in the capture whatever. It was because the captors and claimants have not the legal interest that the custody and protection of the property are vested in the Court of Admiralty. These regulations and restrictions in the Prize Acts were made as much against captors and claimants, and their agents, as any other persons; to prevent collusions, embezzlements, and other unfair practices, and most particularly to prevent captors from fraud, or loss of property, by their agents. Shall parties

Then come in and say, *we* are willing to dispense with Acts of Parliament made against ourselves, *we* desire to divest the Court of Admiralty of that legal custody and protection, with which the law has entrusted it exclusively, and as against ourselves. And for what purpose is this consent, and acquiescence of the parties entered into? To carry into effect an illegal agreement, and to dispose of property to which they have no right or title whatever.

It has been farther urged, that since the parties are quiescent, the Court has no right to proceed *ex officio*. Admitting that the Court was acting merely *ex officio*, in the present case it was competent so to do.

I shall first consider the objections made to this power by the King's Advocate, from the Prize Act.—In several sections of this Act, security was to be required, or proceeds called in *at the request of parties*. In Section 62d, In case of condemnation, where there is *no claimant*, in the Vice Admiralty Court, the Judge may compel the Agent to give security, *at the requisition of the captor*. In clause 63, In cases likewise where there is *no claim*, the proceeds may be vested at *the prayer of the captor*. In the 64th clause, the Judge of the High Court of Admiralty, at the time of serving the inhibition, or at any time pending the appeal, shall assign the agents or other persons in whose hands the proceeds may have come, to bring them into the Registry, *at the prayer of either party*, or of the Treasurer of Greenwich Hospital. The 65th clause, gives a similar power to the Court of Appeals. It was admitted that these provisions mention only cases of *no claim*, causes in the High Court of Admiralty, or in the Court of Appeals, and do not verbally comprehend cases where there is *a claim*, in causes in the Courts of *Vice Admiralty*; but it was argued that the same spirit

must be extended by *analogy* to *these* cases likewise. The inference is certainly to be drawn the other way. When those other cases and Courts are by name mentioned, these clauses cannot be extended to cases and Courts not at all mentioned, and which therefore the Legislature must be supposed to have intentionally excluded from the operation of those clauses.—But in the clauses of the Acts under which *these* proceedings took place, and which *do* relate to the case of claims in the Vice Admiralty Court, expressly, no such restriction, as “*at the request of parties,*” is to be found at all. They say categorically, “the proceeds shall not remain in the hands of captors or their agents, but shall be brought into the Registry of the Court.” They do not require the Court to wait for the application of the parties, but positively direct the thing to be done, and consequently impose it as a duty upon the Court.

It was laid down expressly by Sir William Scott, in *Smart and Wolff*, that Courts of Admiralty have generally the power of proceeding to compel the payment of proceeds, “as well by the act of the Court, *ex officio*, as on the application of the parties interested,” (3. T. R. 329.) He stated it *arguendo*, indeed, but as a settled incontrovertible doctrine, and which was neither disputed by the opposite Counsel, or denied by the Court; and as a power which is frequently, and notoriously exercised.

And indeed the Courts of Admiralty from their very constitution must necessarily be invested with such a power. Those Courts are the trustees, guardians, and protectors of prize, on behalf of the public. The parties, neither separately or jointly, have *the legal property* in the subject of litigation. How many cases may be supposed, in which the security of the property might

demand the interference of the Court, independently of the parties? Imagine fraudulent connivances between parties themselves, or, in their absence, amongst their agents, to the injury of captors and claimants themselves, unforeseen circumstances by which proceeds might be endangered without parties or their agents having it in their power to make application, or not feeling an interest so to do.—In these and many other cases which might be conceived a power of proceeding of its own authority is absolutely necessary to enable the Court to execute the solemn trust reposed in it, for the security of prize property. This custody, and the want of property in the subject of litigation in the parties, create a great difference between the constitution of Courts of Admiralty and all other Courts. A trust and custody imply the possession of powers to execute them.

The only question then is, whether this power has been properly exerted? Proceedings, *ex officio*, must necessarily be governed by the discretion of the Court. I agree with the King's Advocate, that this discretion, ought not to be a mere capricious exertion of authority, but a legal discretion, proceeding upon solid grounds. I conceive then,

1st. That the *positive directions of the Prize Act* are of themselves a sufficient legal foundation for the proceedings of the Court.

2d. When the respondent says "that he stands ready and willing to do any thing which any of the parties interested have a legal right to require him to perform," he does not place the business upon a right footing. He is debtor not to the parties, but to the Court; since the property was in the legal custody of the Court, and the sale made by its officers. The Court must look to the security of the property. I can

have no doubt of the respondent's competency—he has sworn that “he has property sufficient to pay the whole sum.” But that is not the question.—The Court must proceed upon general principles. It is not asked, whether A. B. or C. are responsible men, but whether the Court, without authority and without security, can justifiably leave property to an immense extent in any private hands? The opinion of the Commissioners of Naval Enquiry, in their fourth report, to the House of Commons, was very decided upon this head; they strongly reprobated it as an abuse that agents should have the use of the proceeds of prize in cases of appeal. It sets, they observe, his interest at variance with his duty. The property is in many instances too great to be trusted to an individual, especially if that individual be engaged in trade; and most of the prize agents abroad are merchants: they are tempted to speculate upon it; and we find that some of the most considerable among them have failed at different periods for very large sums. The principal Agency House in Jamaica, which is said to have been concerned in nine tenths of the captures carried into that island during the last war, amounting in value to about £2,143,000 sterling, has been very lately under pecuniary embarrassments,” p. 262.

Under such an authority can the Court be blamed for using some little caution? No power whatever is given to the Court to leave proceeds in the hands of purchasers, or agents; in case of the failure of those purchasers or agents, as no security is given, where is the Court to look for the property? And what is to shield the Court and its Officers from the imputation of a neglect of duty? Not the Acts of Parliament, for they would have been guilty of *laches* in not enforcing them—not an agreement between the parties, which, as respect-

ing the proceeds, are illegal, and void. The Court must look to possibilities; individuals may exercise a discretion, and may run risques, but a public body, acting as a trustee for the public, must go upon certainties. It would be wanting in its duty to itself if it did not reduce these proceeds into its own possession, and to the Crown, in whom the present legal interest vests, and which the Court is bound to interfere for the protection of.

3d. The manifestly hazardous situation of the property itself, from other quarters, in addition, would be a still stronger impulse upon the Court.—A war between Great-Britain and the United States was daily apprehended—this Province was threatened with an immediate attack; allowing every merit to the brave defenders of the Country, it was not impossible that it might be taken by the enemy. In that case it was evident that nearly the whole of the prize property in the hands of individuals would be in danger of total loss.

In consequence of a requisition from the Court, the Marshal made a report of the state of prizes. It appeared that upwards of £.120,000 of the proceeds were in the hands of purchasers, whose time of payment had expired. It was retained by them too without any security.

The Court thought it right that property to this immense amount should not be left exposed in this dangerous situation, but that, in compliance with the Acts of Parliament it should be called in, and invested in the British Funds. In so doing it thought it was exercising a sound discretion for the security of the property entrusted to it, and that it was performing its duty to the King, to the British Nation, and to the Officers and Men of the squadron upon this station.

Upon these grounds the general order of the 23d of September was issued, directing all purchasers to pay in their proceeds. Three months elapsed, and but a small part was brought into the Registry. The order of the 29th of December was then made, and monitions directed against defaulters, beginning with the case of the Herkimer, because the proceeds in that case were of far greater amount than in any other, and because it was understood that resistance would be made to the order for payment. If the order was properly issued it was necessary to enforce it by farther process.

I have hitherto gone on the supposition that the Court proceeded *ex officio*, and have shewn that it had that power, and was fully justified in exerting it, under the present circumstances. But I am more inclined to think that these proceedings were not *ex officio*.—They were founded upon the application of the parties. The minutes of the Court appear thus in the Register: "On motion of Counsel for captors and claimants, stating that difficulties had occurred in procuring securities, and praying the Court to direct a sale of the property, and the proceeds paid into the Registry, and to take the usual course—the Judge decreed a commission of sale." The express application of both the parties, concurred, therefore, with the regulations of the Prize Act, in imposing an obligation upon the Court to compel the payment of the proceeds.—The monition was merely in execution of the commission of sale, and in aid of the Marshal, who was answerable for the proceeds of sale.

The Court might indeed have proceeded against the Marshal, and have committed him upon an attachment for not returning the commission with the proceeds, as in the case of the *Fortuna*, *Gerrits*, or the Marshal might have prayed a monition against the party. But as the Marshal stated to the Court that he had applied

in vain for payment, the Court judged it expedient, and the most expeditious mode of proceeding, to issue a monition directly against the party who was in possession of the proceeds.

Little stress was laid upon one argument just stated by the Counsel, that the whole cause was now out of this Court on account of the appeal. On this no farther observation need be made, than that these proceedings are what are directed by the Act to take place after the appeal entered, and in consequence of the appeal.

In considering the protest, and the answer, and in following the arguments of Counsel in their full extent, and in every point of view, which for the satisfaction of the parties, and the justification of the Court, I thought it incumbent upon me to do, I have been obliged to take a wide range. To bring the whole to a single point.—It is evident then that the respondent's plea, that though in *strictness of law* he may be a purchaser, under the Marshal's sale, and responsible for the purchase money, yet in *justice and equity* he ought not to be called upon to pay it, because *the truth of the transaction was* that it was a present sale of the ship and cargo by the captors to the claimants, is not maintainable, because the captors had no legal interest, or property in the ship or cargo to dispose of. 2dly, That though after the sale by the Marshal, the purchasers had a right to dispose of the ship and cargo in what manner they thought proper, the Court is only concerned with the contract of sale, and has nothing to do with the subsequent transactions; which can therefore afford no plea for the retention of proceeds. 3dly, That the respondent has no right whatever to hold the proceeds as agent for the parties, because the Prize Acts give no such power, but expressly direct them to be paid into the Registry. 4thly, That the respondent, therefore, stands

before the Court only as a purchaser—as a mere stranger in possession of the proceeds of prize, and consequently liable to the farther compulsory process of the Court in case of non-payment. I conceive too that as any other purchaser, by the law and practice of merchants, he is chargeable with interest from the time of payment, which, by the conditions of sale, was fixed at six months.

However great may be the interests at stake, the present transaction in itself is a mere trifle in comparison to the real question before the Court, which is not merely whether the proceeds of the *Herkimer* shall be brought into the Registry, but whether the parties, or the Court of Admiralty, have the custody and disposal of captures before final adjudication; whether the powers and authorities of the Court shall be superseded, and the regulations of the Legislature evaded and defeated, by a combination of parties. The substance of the answer, with the statements of Counsel, do indeed afford a most extraordinary kind of defence. When the purchaser is called upon to pay the purchase money, we are told, that by some private understandings, unknown to, and unauthorized by, the Court, a solemn public sale made under its authority, by its own officers, and under the express directions of an Act of Parliament, is a mere fictitious sale, the purchasers ideal, and the purchase money returned in the Marshal's account of sales a non-entity, which nobody is accountable for; and that under colour of that fictitious sale, without any authority from the Court, the parties have taken possession of ship, cargo, and proceeds; the law indeed says that captures shall not be delivered to parties, but upon bail, upon the stipulation of two securities, who must justify, in double the value, besides the responsibility of the party; and that proceeds shall not be retained in

any case.—By this contrivance of a sale, they have evaded the Prize Act, and have got possession of the capture without giving any security whatever, and still claim to hold the proceeds; and it cannot but occur to the recollection of the Court that the person who has thus acquired the possession without security, in open Court, declared himself unable to justify as *one* of the securities. Having thus, I may say, as against the Court, and if their plea could be valid, *fraudulently* obtained possession, the parties have divided the ship and cargo amongst themselves, without a shadow of right, or power. Such a case loudly calls upon the Court to vindicate its own authority, and that of the laws.

It has been alledged, by way of a mitigatory plea, by the respondent, "That he would not have been concerned in the purchase if he had apprehended that it would have been required of him to pay into Court the whole proceeds of the sale of the said ship and cargo, the particular object of the said purchase on the part of the respondent being to enable him to carry into effect the said agreement." If indeed the parties in this case had erred through ignorance, or from inadvertence, they might justly be entitled to some indulgence; but they were perfectly cognizant of the nature of the transaction in which they were engaged. The law upon the subject has been frequently stated by this Court. It has had occasion to animadvert upon former irregularities, which had taken place with respect to agreements, and divisions of proceeds. In this case, in particular, soon after the condemnation, when it was proposed to take the property upon bail, and when Commodore *Beresford* gave in his protest against a compromise, the Court, at length, stated the law relating to the rights and powers of parties, and their agents, over captures and proceeds. It stated them precisely

in the same manner as it has done this day, and it supported its opinion by the quotation of the same great leading decisions which it has now again referred to. If, with this information, and after such caution given, parties will take upon themselves to be wiser than the law, to contravene the provisions of the Legislature, and to act in defiance of the Court, to themselves only they must attribute the consequences.

But the respondent, though thus without lawful excuse, has thrown himself upon the compassion and mercy of the Court. He alledges that though "he has property sufficient for that purpose, engaged as he is in commercial concerns, it would be highly detrimental, if not ruinous to him, to be compelled to pay the said sums into Court." I hope, in attending to that plea, I do not suffer my feelings as a man to encroach too much upon my public duty ; but I am unwilling to exert even the just authority of the Court, to the detriment of any individual. However unjustifiably they may have acted, the Court is disposed to enable the parties, as far as is consistent with its duty, to disentangle themselves, if possible, from the difficulties in which they are involved. I have no doubt but the respondent is responsible, both now and after the final decision, to the full amount of the proceeds of this ship and cargo : The only relief which it is in the power of the Court to allow is that of delay as to the time of payment.

The respondent prayed the Court to receive another affidavit in explanation of the transaction before it decreed any further process, the material part of it was as follows :

"The only means which now remained to be adopted were to let the ship and cargo be sold under

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the authority of the Court, but adhering to the purpose of compromise—the basis of which was that *Grifwold* and myself should be accountable to the claimants for the sum of £.43,875 (from which would be deducted £.23,600, their part of the sum compromised) it became necessary that we should not suffer the property to be sold for a less sum, it was agreed that I should become the ostensible bidder, and as neither ship or cargo brought the sum we agreed upon to be the true value—they were of course knocked down to me. After the sale it was agreed that as the ship could not sail from Halifax in any other capacity than a British vessel—that I should take her wholly to myself for £.2,500, which I accordingly did, and she was registered in my name by that of the *George*. The cargo was to be equally divided between Mr. *Grifwold*, and myself. As the bark and copper were better adapted for the English, than the American markets, we determined that those articles, which composed part of the *Herkimer's* cargo, should be sent to London on our joint account. The cocoa, being the other part of the cargo most suitable for the market of the United States, it was decided should be laden on the *George* for New York. Upwards of three hundred tons were accordingly shipped on that vessel. Previous, however, to her sailing, I agreed to buy from Mr. *Grifwold* half the copper, (being his interest in it) at 16d. per lb. amounting to £.4,668, and seventy-five tons of his half the cocoa, at £.71 per ton, amounting to £.5,325. Thus I held an interest in the *George's* cargo, to New-York, of two hundred and twenty tons of cocoa. I also agreed with him for a certain commission of four and a half per cent. to consign my said part of that vessel's cargo to him for sale at New-York, he guaranteeing to me the sales and remittances. In conse-

quence of his allowing me to ship to London his half the bark, to be consigned to my correspondent, and the proceeds to be under my controul, I allowed him to retain 17,400 dollars (the prime cost thereof) out of the proceeds of the George's cargo. The balance of the proceeds of that consignment, and the amount of sales of the ship, *Grifswold* was to remit to my agent in London, on or before the 1st of August, 1807, in the event that the compromise, could not, by the opinion of Sir *John Nicholl*, be legally completed in the Court of Appeals. For the more clear elucidation of these transactions, and the state of Mr. *Grifswold's* account with me, I refer to the annexed paper, by which it will evidently appear, that he has under his controul the proceeds of the ship and cargo, to the amount of about £.27,000."

From this affidavit, though the respondent had stated in his first affidavit that it would be "grievously oppressive upon him to be compelled to pay the said proceeds, when he had received but a very small part of the said property." it now appeared that more than three fourths of the property belonged to him, and had been sent on his own account for sale to the most advantageous markets, above a year since.

That though the respondent had stated, "that he had not derived the smallest profit or advantage from this transaction," yet that it was in reality a speculation from which the agents expected to have received much emolument; that the bark and copper sent to England and lost, were covered by an insurance; that by the statement in the account current, of the probable proceeds of the ship and cargo at New-York, compared with the prices paid by the respondent to Mr. *Hill* and Mr. *Grifswold*, the respondent expected to realize above £.3000 upon those sales only; that those sales having

been effected, and Mr. *Grifwold* charged with those probable proceeds, there was reason to believe that that part of the speculation had succeeded.

That though the respondent stated, that one principal reason for listening to the claimants proposals was, "the great loss of interest which would arise to the captors on the proceeds of the ship and cargo during the controversy of an appeal," yet that by the mode adopted no interest whatever would be made upon the proceeds for the benefit of the captors, as would have been the case had the method prescribed by the Act of Parliament been pursued, by placing the money upon public security, where the accumulating interest would have paid the expences of the cause.

And, upon the whole, that though these statements were immaterial to the points in question, yet that the facts appearing upon them rendered the principles laid down by the Court still more applicable to the case.

The Court however in fixing the time for payment consulted the wishes of the party himself, and, accordingly,

Decreed a peremptory monition to the respondent, to pay £.41,671 19 4, with interest, from six months after the sale, on or before the 10th day of May next.

